

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IRVING E. SMITH,

Appellant,

v.

OLYMPIC AIR POLLUTION CONTROL
AUTHORITY,

Respondent.

PCHB No. 90-27

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

This appeal contests Olympic Air Pollution Control Authority's ("OAPCA") issuance of a Notice of Violation of WAC 173-433-150(1)(b) which prohibits burning in any non-certified solid fuel burning device during a period of declared impaired air quality for the geographic area. The Pollution Control Hearings Board held a hearing on April 17, 1990, starting 1:15 p.m. at the Board's office in Lacey, Washington. Board members present were Wick Dufford, Presiding, and Harold S. Zimmerman.

Appellant Irving E. Smith represented himself. Attorney Fred Gentry of Bean, Gentry and Rathbone represented Olympic Air Pollution Control Authority.

1 A court reporter affiliated with Gene Barker & Associates
2 recorded the proceedings. Witnesses were sworn and testified.
3 Exhibits were admitted and examined. Argument was made.

4 From the foregoing, the Board has deliberated and makes these

5 FINDINGS OF FACT

6 I

7 Based on meteorological data of impaired air quality, OAPCA
8 declared an outdoor burning ban on January 18 and 19, 1990, and added
9 an indoor burning ban at 9:15 a.m., January 20, 1990, for all of
10 Thurston County as shown on the agency's log for those days.

11 II

12 In the afternoon of January 20, 1990, while driving in the
13 Mountain View Elementary School neighborhood, OAPCA Inspector Robert
14 Moody saw a blue and white house at 3421 - Stikes Drive SE, Lacey,
15 with smoke rising from the rear of the ridge above the second story on
16 the northwest end.

17 III

18 Inspector Moody took a photo of the house at 3:46 p.m. and
19 prepared a burning violation report which was sent by certified mail
20 to Irving E. Smith at 3421 - Stikes Drive SE, Lacey, Washington, on
21 January 26, 1990. Mr. Smith does not deny that his woodstove was
22 being burned at the time.

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27 FINAL FINDINGS OF FACT,
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IV

The public is notified about OAPCA's burning bans in Thurston County by announcements over local radio stations and Seattle's KIRO. In addition, OAPCA maintains a toll-free telephone line to provide up-to-date burning ban information. A box in the Daily Olympian also advises of such bans, but generally this information is not published until the day after any condition of restriction is imposed.

V

Because this was a first violation, a \$50 penalty was assessed and \$25 was suspended, with the notice stating that a second violation would result in a penalty of \$150 to \$250, plus any previous suspensions, and that a third violation would be \$400.

VI

Irving E. Smith is a retired forester with the U.S. Forest Service, a native of Washington, who with his wife retired to South Park, Lacey, in 1984. In winter the primary heat source for their home, in fact, is burning wood. However, the house is equipped with a forced electric heat system which could be used. The Smiths do not use the electric heat often because of its cost.

VII

There is no evidence that the woodstove used by the Smiths has been certified as complying with emission performance standards. (See RCW 70.94.457 and WAC 173-433-100.)

VIII

The Smiths do not listen to the radio habitually, and were unaware of this burning ban. Both have been away frequently because of Smith's attending cardiac rehabilitation sessions at St. Peter Hospital since his heart attack prior to Christmas, 1989.

IX

The OAPCA inspector did not stop at the Smith home on January 20, 1990 to ask about the burning, or to mention the violation, possible penalty, and potential future penalties.

X

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such.

From these Findings of Fact, the Board enters the following

CONCLUSIONS OF LAW

I

In keeping with the objectives of the Washington Clean Air Act, as enunciated in RCW 70.94.011, the legislature has declared it to be the public policy of the state to control, reduce and prevent air pollution caused by wood stove emissions.

II

In the instant case RCW 70.94.473 applies:

Any person in a residence or commercial establishment which has an adequate source of heat without burning wood shall:

(1) Not burn wood in any solid fuel heating device whenever the department has determined under RCW 170.94.715 that any air pollution episode exists in that area;

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1 (2) Not burn wood in any solid fuel heating device,
2 except wood stoves which meet the standards set forth in
3 RCW 70.94.457, in the geographical area and for the
4 period of time that impaired air quality has been
5 determined, by the department or any authority, for that
6 area. For the purposes of this section, impaired air
7 quality shall mean air contaminant concentrations
8 nearing unhealthful levels concurrent with
9 meteorological conditions that are conducive to an
10 accumulation of air contamination.

11 III

12 OAPCA's action in this case focused on WAC 173-433-150, the
13 implementing state regulation. In pertinent part that regulation
14 states:

15 (1) A person in a residence or commercial
16 establishment with an adequate source of heat other
17 than the burning of solid fuel shall not burn solid
18 fuel in any solid fuel burning device:

19 (a) Whenever the department has declared an air
20 pollution episode for the geographical area pursuant to
21 chapter 173-435 WAC; or

22 (b) Whenever the department or an air authority has
23 declared impaired air quality for the geographical
24 area, except when the solid fuel burning device is
25 certified under WAC 173-433-100.

26 (2) A person responsible for a solid fuel burning
27 device already in operation at the time an episode
is declared shall extinguish that device by
withholding new solid fuel for the duration of the
episode. A person responsible for a solid fuel
burning device that is not certified under WAC
173-433-100 already in operation at the time
impaired air quality is declared shall extinguish
that device by withholding new solid fuel for the
duration of the impaired air quality. Smoke
visible from a chimney, flue or exhaust duct after
a time period of three hours has elapsed from the
time of declaration of the episode or impaired air
quality shall constitute prima facie evidence of
unlawful operation of an applicable solid fuel
burning device. This presumption may be refuted by
demonstration that the smoke was not caused by an
applicable solid fuel burning device.

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IV

OAPCA, in demonstrating that smoke was visible from a duct in the Smith's roof after more than three hours had elapsed from the declaration of the burn ban, established a prima facie case of violation.

It then became appellant's burden to refute the presumption. This could be accomplished in at least three ways: (1) by showing that the smoke was not from a "solid fuel burning device"; (2) by showing that there is no adequate source of heat for the residence other than the solid fuel burning device; (3) by showing that the woodstove has been certified as meeting emission performance standards under WAC 173-433-100.

Here none of these three defenses were made. By statute a woodstove is a "solid fuel burning device." RCW 70.94.453(5). Evidence of an alternate heat source was not refuted. No evidence of certification was presented.

Therefore, we conclude that the burning at the Smith home in the afternoon of December did violate WAC 173-433-150(1)(b), as alleged.

V

We note that the progressive increase in penalties discussed in the notice of penalty here is not mandatory. The guidelines adopted by OAPCA for their levying penalties are not part of the law and are discretionary, particularly as they apply beyond first violations.

1 Because of the present system of notifying the public of burning
2 curtailments, it can be anticipated that there are persons who will
3 not know because they do not listen to the radio, and do not have
4 reason to call the agency. There may also be persons who repeatedly
5 call the agency and cannot get through and are, therefore, unaware of
6 a ban. Given the inevitability of such problems, we suggest that
7 OAPCA consider a system involving contact with the homeowner by
8 knocking on the door or calling the residents to verify their facts.
9 In cases such as this, the fire would be quickly extinguished and
10 thus, the desired result obtained without having to resort to monetary
11 fines. The agency would, of course, retain the power to levy fines
12 where citizens are not cooperative.

13 VI

14 Under the circumstances here, we do not believe the collection of
15 a civil penalty is appropriate.

16 VII

17 Any Finding of Fact which is deemed a Conclusion of Law is hereby
18 adopted as such. From these Conclusions of Law the Board enters this
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1 ORDER

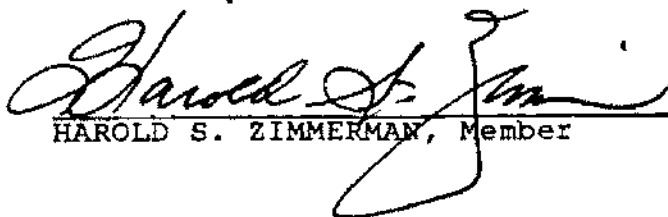
2 The violation is affirmed, but the penalty is suspended in its
3 entirety, subject to compliance with OAPCA's regulations for one year
4 from the date of this decision..

5 DONE this 4th day of May, 1990.

6 POLLUTION CONTROL HEARINGS BOARD

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9 WICK DUFFORD, Presiding

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12 HAROLD S. ZIMMERMAN, Member

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